

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
CONDITIONAL USE PERMIT GRANTED
BY THE CITY OF HOQUIAM TO W.
BENTOW, W. CASTOR AND
L. ZIMBELMAN,

JANET L. ANTHONY and FRIENDS OF
BOWERMAN BASIN,

Appellants,

v.

W. BENTOW, W. CASTOR AND
L. ZIMBELMAN, CITY OF HOQUIAM,
and STATE OF WASHINGTON
DEPARTMENT OF ECOLOGY

Respondents.

SHB No. 87-2

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER

This matter, a request for review of a Shoreline Substantial Development Conditional Use Permit for the construction of a welding and machine shop, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Chairman, Wick Dufford, Judith Bendor, Nancy Burnett and Dennis McLerran, Members, on May 1, and 4, 1987, at Hoquiam, Washington. Administrative Appeals Judge, William A. Harrison, presided. Appellant Janet L. Anthony represented herself

and Friends of Bowerman Basin. Respondent City of Hoquiam was represented by Jon C. Parker, Assistant City Attorney. Respondent State of Washington Department of Ecology appeared by Jay J. Manning, Assistant Attorney General. Respondents Mssrs. Bentow, Castor and Zimbelman did not appear by counsel. Reporters Lisa Flechtner and Bibi Carter reported the proceedings.

Witnesses were sworn and testified. Exhibits were examined. From testimony heard and exhibits examined, the Shorelines Hearings Board makes these

FINDINGS OF FACT

I.

This matter arises near Bowerman Basin of Grays Harbor in the City of Hoquiam.

II.

In our prior decision, Janet L. Anthony and Friends of Bowerman Basin v. City of Hoquiam, Department of Ecology and Springer, SHB Nos. 84-52 and 84-61 (1985), the same parties sought review of shoreline permits to fill 21 acres which includes the site of the proposed welding shop in this matter.

III.

By the prior decision cited above, we have determined the following:

1. Bowerman Basin of Grays Harbor is an ecosystem consisting of tideland, marsh

SHB 87-2

FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW & ORDER

(2)

and waters precious to shorebirds and raptors, their natural predators. Statewide and national interest has focused recently upon the annual migration of shorebirds each spring.

2. The 21 acres in question are on the edge of Bowerman Basin.

3. The 21 acres is diked along its boundary with Bowerman Basin.

4. Historically, the 21 acres had been filled by dredge spoils from Grays Harbor.

5. The 21 acres therefore constituted a filled area even before the final fill proposed to form a stable base for future development.

6. The waterward toe of the dike is the place where tidewater has left its uppermost distinguishable mark.

7. The 21 acres is not a shoreline of state-wide significance as that term is used in the Shoreline Management Act.

8. The 21 acres is designated "Urban" by the Hoquiam Shoreline Master Program. That Master Program contemplates commercial/industrial use within the 21 acre site.

9. A public walkway and buffer along the diketop would provide the public with an opportunity to view Bowerman Basin and would screen future industrial/commercial uses on the 21 acre site.

IV.

Following issuance of our decision, the City filled approximately 5 acres of the 21 acre site. The City also hired a consultant to plan the public walkway and buffer, which have not yet been established.

V.

Following the filling of approximately 5 acres (including the site at issue here), Messrs. Bentow, Castor and Zimbelman applied to the City of Hoquiam for a shoreline substantial development and conditional use permit. The proposed development

consists of a welding and machine shop of some 1100 square feet to be located on a 4 acre site within the 21 acres previously filled.

VI.

The Hoquiam Shoreline Master Program (HSMP) specifies that non-water related commercial or industrial uses are allowed as conditional uses. Section 1.060, table 2. The criteria for conditional use is at HSMP Section 1.190 and is substantially the same as the pertinent portions of the Department of Ecology criteria at WAC 173-14-140, which are:

WAC 173-14-140 Review criteria for conditional use permits. The purpose of a conditional use permit is to allow greater flexibility in varying the application of the use regulations of the master program in a manner consistent with the policies of RCW 90.58.020: Provided, That conditional use permits should also be granted in a circumstance where denial of the permit would result in a thwarting of the policy enumerated in RCW 90.58.020. In authorizing a conditional use, special conditions may be attached to the permit by local government or the department to prevent undesirable effects of the proposed use.

(1) Uses which are classified or set forth in the applicable master program as conditional uses may be authorized provided the applicant can demonstrate all of the the following:

(a) That the proposed use is consistent with the policies of RCW 90.58.020 and the policies of the master program;

(b) That the proposed use will not interfere with the normal public use of public shorelines;

(c) That the proposed use of the site and design of the project is compatible with other permitted uses within the area;

(d) That the proposed use will cause no unreasonably adverse effects to the shoreline environment in which it is to be located; and

(e) That the public interest suffers no substantial detrimental effect.

(2)...

(3)...

(4) In the granting of all conditional use permits, consideration shall be given to the cumulative impact of additional requests for like actions in the area. For example, if conditional use permits were granted for other developments in the area where similar circumstances exist, the total of the conditional uses shall also remain consistent with the policies of RCW 90.58.020. and shall not produce substantial adverse effects to the shoreline environment.

VII.

After review of the applicants' environmental checklist, the City issued a declaration of non-significance under the State Environmental Policy Act. The City then granted the shoreline permit on October 27, 1986. The Department of Ecology approved the conditional use element of the shoreline permit by letter dated December 9, 1986. In doing so, the Department added the following condition:

As a condition of this permit and pursuant to the final order of SHB 84-52/61, the applicant shall plant a vegetated buffer strip, including a public walkway, along the entire western and northern perimeter of the site. This buffer strip shall extend a minimum of 25 feet landward from the outside top edge of the existing dike. The applicant shall submit the site plan and any necessary additional information via the city of Hoquiam to the Department of Ecology for the department's approval. This site plan and additional information shall indicate the type and

1 extent of vegetation to be planted
2 including species composition and number
3 of plantings to be made as well as the
4 location and dimensions of the walkway.
5 No other development may occur on site
6 until the department has approved the
7 buffer strip and walkway site plan and the
8 plantings and walkway have been completed.
9 (Emphasis added.)

10 On January 8, 1987, appellants filed with this Board their request for
11 review of the shoreline permit granted for the welding and machine
12 shop.

13 VIII.

14 The applicants propose to connect the shop to city sewer and to
15 employ oil separators in the system.

16 IX.

17 The applicants propose to conduct operations within, and not
18 outside of, the proposed building.

19 X

20 The Grays Harbor Estuary Management Plan, now as in previous
21 years, remains in draft form and unadopted.

22 XI.

23 A proposal to establish a national wildlife refuge at Bowerman
24 Basin is under consideration by the Washington State Congressional
25 Delegation which may submit the matter for consideration in Congress.

26 XII.

27 In September, 1986, a study of Peregrine Falcon habitat in Grays
28 Harbor was released. Although released at that time, the study was

concluded in April, 1982. The study results were known to the U.S. Office of Ocean and Coastal Resource Management in 1983 when it prepared its Program Draft Environmental Impact Statement for the proposed, draft Grays Harbor Estuary Management Plan. The study does not constitute significant, new information. The evidence does not establish that the study identified any substantial detrimental effect from the proposed development.

XIII.

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board comes to these

CONCLUSIONS OF LAW

I

The general propriety of commercial and industrial use for the 21 acres in question has been actually and necessarily litigated in the prior case before us. We have held such use to be consistent with the Hoquiam Shoreline Master Program (HSMP) and the Shoreline Management Act, chapter 90.58 RCW. Anthony v. Hoquiam, SHB Nos. 84-52 and 84-61 (1985). Issues actually and necessarily litigated at a prior proceeding cannot be relitigated in a subsequent hearing before this Board. Wilcox et. al. v. Yakima County and Dep't of Highways, SHB No. 77-28 (1978). Appellants are barred by collateral estoppel from relitigating that holding in this appeal.

SHB 87-2

FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW & ORDER

(7)

II.

We will consider the issues raised in this appeal only as they bear upon the specific, proposed development, a welding and machine shop.

III.

Premature Action. Appellants urge that the city and Department of Ecology (DOE) acted prematurely in approving this shoreline permit prior to final action either a) adopting a Grays Harbor Estuary Management Plan or b) a federal wildlife refuge. We disagree. Neither the draft management plan nor proposal for a wildlife refuge can operate to stay the shoreline permit application process.

IV.

State Environmental Policy Act. We have reviewed the environmental declaration of non-significance in this matter, and conclude that it was not erroneous. The proposed development would not have more than a moderate effect upon the quality of the environment. Norway Hill Preservation and Protection Association v. King County Council, 87 Wn.2d 267, 552 P.2d 674 (1976).

V.

Hoquiam Shoreline Master Program and WAC 173-14-140 on Conditional Uses. The proposed development as conditioned by Department of Ecology is consistent with the criteria of both the HSMP and the state standard (WAC 173-14-140) for shoreline conditional uses. We approve,

generally, of the condition added by Department of Ecology. We approve, particularly, the language of that condition which requires completion of the dike-top walkway and plantings prior to other development, including this welding and machine shop.

VI.

Five aspects of the proposed development should be expressly preserved as conditions within the shoreline permit. These are:

- 1) The walkway along the dike shall be constructed so as to prevent usage by motorized vehicles. Signs shall be posted alerting the public of the walkway and prohibiting motorized vehicles.
- 2) The welding and machine shop shall be connected to city sewer.
- 3) All welding and fabrication operations shall be conducted within the shop building.
- 4) This permit does not allow the fueling of vehicles outside the shop nor outside vehicle maintenance involving materials which would tend to cause water pollution.
- 5) There shall be no surface runoff from the developed area of the permit site into ditches, natural drainage courses, and the like. To the extent available such runoff shall be directed to a storm drainage system. An oil separator shall be installed and maintained in this system.

These conditions are necessary to preserve the limits of the proposal and to achieve consistency with the HSMP and state conditional use criteria.

VII.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions the Board enters this

ORDER

The shoreline permit granted to Mssrs. Bentow, Castor and Zimelman is remanded to the City of Hoquiam for reissuance in the same form as previously (including the conditional approval of Department of Ecology) but with addition of the five conditions set forth at Conclusion of Law VI hereof.

DONE at Lacey, Washington this 2nd day of July, 1987.

SHORELINES HEARINGS BOARD

Lawrence J. Faulk, Chairman 6/3/87

Wick Dufford, Member

Judith Bendor, Member
(See Concurring Opinion)

Nancy Burnett, Member

Dennis McLerran, Member
(See Concurring Opinion)

William A. Harrison
William A. Harrison
Administrative Appeals Judge

SHB No. 87-2

Bendor and McLerran Concurring Opinion:

We concur in the result, but would rest the decision on narrower grounds:

It is undisputed that Bowerman Basin is a wildlife ecosystem of critical importance, "a mosaic of tideland, marsh and waters precious to migratory birds in the Pacific flyway . . ." Anthony et al. v. Friends of Bowerman Basin, SHB Nos. 84-52 & 61, ("previous decision"), Finding III at p.3. See also, Friends of the Earth v. Hintz, 800 F.2d 822, 825 (9th Cir., 1986).

Evidence in this appeal before us showed that the particular site in question is hydrologically continuous with Bowerman Basin, i.e. that rain which percolates through the site's soil joins the waters of the Basin. In addition, recent new information was presented that 12 acres of the overall 21 acres at issue in the previous decision are "wetlands" within the meaning of the Section 404 Corp permit program (Exhibit A-2, Army Corps of Engineers 1985 memorandum). The welding shop site, however, is not within the Corps' 1985 "wetlands" determination. The City of Hoquiam has recently filled the 4+ acres of the proposed welding shop site.

Concurring Opinion
(Bendor/McLerran)

SHB NO. 87-2

1 Because of this immutable fact - the recent fill - we are
2 constrained to concur in our colleagues' result.

3 But the opinion of the plurality three Board members' opinion
4 inappropriately, in our view, employs collateral estoppel, citing the
5 previous decision. As a result, the opinion bars any consideration in
6 this case of whether commercial and industrial uses are consistent
7 with the Hoquiam Shoreline Master Program and the Shoreline Management
8 Act.¹ That previous opinion (SHB No. 84-52) is founded on an
9 erroneous conclusion of law (III at p.9),² i.e. that the 21 acre
10 site is not a Shoreline of Statewide Significance. To the contrary,
11 based on that decisions' own findings of fact (II at p.3, VII at p.5),
12 portions of the 21 acres are clearly Shorelines of Statewide
1 Significance. Grays Harbor up to the ordinary high water mark and its
14 associated wetlands are such Shorelines. RCW 90.58.030(e)(1) and
15 (vi). Lands 200 feet from ordinary high water of a Shoreline of
16

17 1. The opinion also does not analyze whether the site's recent fill
18 is consistent with these laws. No party raised that issue on
19 appeal, and that fill is already in place.

20 2. Conclusion of Law III stated:

21 Appellants assert that the property in question is located
22 within shorelines of state-wide significance (SSWS) as defined at
23 RCW 90.58.030(2)(e)(i). Evidence at hearing clearly established
24 that the subject property is indeed entirely landward of and
25 separated from the line of ordinary high water (OHWM) and,
26 therefore, is not located within shorelines of statewide
27 significance.

1 Statewide Significance are such shorelines, id., whether or not they
2 are wetlands under classical biological or hydrological terms. In
3 addition, marshes, bogs, swamps, etc., beyond this 200 feet may also
4 be "wetlands" within the Shoreline Management Act. RCW
5 90.58.030(1)(2)(f). See generally, Real Property Deskbook (2nd ed.
6 1986) at 84-70.

7 The previous decision failed to engage in the heightened scrutiny
8 required for Shorelines of Statewide Significance. RCW 90.58.020. It
9 should be noted that landfills in such shorelines are generally
10 inconsistent with the Act. See generally, Real Property Deskbook,
11 supra, at 84.39.

12 Although we concur in the result reached by the plurality because
1 of the recent filling of the 4(+) acre welding site, we do not concur
14 in the use of collateral estoppel to reach that result. In this case,
15 the application of that doctrine is inappropriate. It creates an
16 injustice of perpetuating a decision grounded upon an erroneous
17 conclusion of law. See, MacDaniels v. Carlson, 108 Wn.2d 299 (1987).
18 Such overbroad reference to collateral estoppel may erroneously create
19 the impression that future shoreline permits in possible wetlands or
20 areas within 200 feet of the ordinary high water mark within the
21 remainder of the 21 acres, need not be subjected to a consistency
22 determination or to heightened scrutiny under the SMP or the SMA.

1 We also note with some concern the City of Hoquiam's slow pace in
2 implementing the over two-year old permit condition in the previous
3 case, which required the implentation of the buffer walkway. Of
4 greater concern, however, is the cutting down of trees within the
5 21-acres at the direction of a City official. Such action, at the
6 least, appears to violate the spirit of the previous permit. And
7 lastly, we note with dismay the City's failure to notify appellants of
8 the issuance of the DNS, despite their request to be so informed, and
9 their previous demonstrated interest in this matter, e.g. SHB Nos.
10 84-52 & 61. Such failure to provide notice, while not rising to a
11 reversible error in this particular instance, does not appear to
12 promote the broad policy mandates of the State Environmental Policy
Act, Chapter 43.21C RCW.

15 THEREFORE, we concur in the result only.

16 DATED this 2nd day of July, 1987.

19
20 
Judith A. Bendor, Member

21
22 
Dennis McLerran, Member /by JB/

23 Concurring Opinion
24 (Bendor/McLerran)
25 SHB NO. 87-2